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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

MCCLATCHY NEWSPAPERS d/b/a
THE SACRAMENTO BEE,
Petitioner,

VS.

CENTRAL VALLEY TYPOGRAPHICAL UNION No. 46,
INTERNATIONAL TYPOGRAPHICAL UNION,
Respondent.

Petition For A Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the court below properly affirmed the district court's confirmation of the Eaton labor arbitration award.

2. Whether the court below applied the proper legal standard for confirmation of arbitration awards by requiring merely that the decision constitute a "plausible interpretation," rather than by examining the arbitrator's words to determine whether the decision drew its essence from the collective bargaining agreement.

PARENT COMPANY AND SUBSIDIARIES

McClatchy Newspapers

Nor Cal Cablevision, Inc.

Anchorage Daily News, Inc.

Telcab Communications, Inc.

Legi-Tech

All other subsidiaries of McClatchy Newspapers are wholly-owned.

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THE SACRAMENTO BEE,
Petitioner,

VS.

CENTRAL VALLEY TYPOGRAPHICAL UNION No. 46,
INTERNATIONAL TYPOGRAPHICAL UNION,
Respondent.

Petition For A Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner McClatchy Newspapers, d/b/a The Sacramento Bee ("Publisher" or "Petitioner") petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit, which affirmed a judgment of the United States District Court for the Eastern District of California confirming an arbitration decision by Arbitrator Eaton. The Respondent is the Central Valley Typographical Union No. 46, International Typographical Union ("Union" or "Respondent").

In that opinion, the United States Court of Appeals for the Ninth Circuit also vacated the district court's amended order and judgment which, in addition to confirming the

arbitration award, contained additional findings and directives that went beyond the arbitrator's decision as well as the district court's initial judgment. Petitioner claims error only as to the Ninth Circuit's affirmation of the district court's confirmation of the arbitration award. No error is claimed in the Ninth Circuit's vacation of the amended order and judgment of the district court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on July 14, 1982, is not yet reported. It is reproduced *infra* in Appendix A ("App.") at pp. A1-A10. That opinion was amended by order of the court of appeals filed on September 22, 1982. That order, issued September 22, 1982, is also not reported. It is reproduced *infra* (App. B, pp. B1-B2).

The judgment of the United States District Court for the Eastern District of California, which was affirmed by the court below is not reported. It is reproduced *infra* (App. C, pp. C1-C2).

The decision of Arbitrator Eaton which was confirmed by the district court is reproduced *infra* (App. D, pp. D1-D24).

JURISDICTION

The opinion (App. A) of the court of appeals was filed on July 14, 1982. That opinion was modified by order of the court of appeals in ways not germane here, on September 22, 1982, which order (App. B) also denied the Publisher's petition for rehearing and suggestion for rehearing *en banc* and the Union's petition for rehearing and clarification. Mandate was stayed by the court of appeals by order issued on October 4, 1982 staying mandate pending filing, consideration and disposition by

the Supreme Court of the instant petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185 is set forth at App. E, *infra*, pp. E1-E2.

STATEMENT OF THE CASE

Petitioner is a California corporation publishing The Sacramento Bee. Prior to 1978, Petitioner had entered into successive collective bargaining agreements with Respondent which represented The Sacramento Bee composing room employees. The Petitioner also had collective bargaining and contractual relations with Respondent's sister union, the Sacramento Mailers Union, Local 31, International Typographical Union ("Mailers Union"), covering The Sacramento Bee mail room employees.

In 1973, the Petitioner contemplated certain technological changes in the composing room operations and engaged in collective bargaining with Respondent concerning these contemplated changes. The collective bargaining culminated in a memorandum of agreement commonly known as the "Scanner Agreement" which, *inter alia*, provided for the assignment of certain work to members of Respondent and a guarantee of lifetime employment to certain members appearing on lists attached to the Scanner Agreement. These job guarantees were neither absolute nor unconditional and could be lost under circumstances other than technological layoff. For example, the Scanner Agreement provided that:

> In case of a strike . . . such employment guarantee shall immediately cease and continuance of this Agree-

> ment will be contingent upon the terms of a negotiated strike or lockout settlement. . .

On December 31, 1976, the Petitioner's separate collective bargaining agreements with Respondent and the Mailers Union expired. By mid-1978, Petitioner and Respondent reached an agreement on wages and hours and working conditions of the composing room employees of The Sacramento Bee, for the period January 1, 1976 through and including December 31, 1979. Unfortunately, no new agreement was reached with the Mailers Union. On at least two occasions prior to the parties' April 1978 agreement, Petitioner's bargaining representatives warned the Union's representatives that if the Union's members honored the picket line of the Mailers Union, then the Respondent's members would be on strike, and in accordance with the Scanner Agreement, would lose their job guarantees. Significantly, the Respondent's bargaining representatives neither disputed this admonition nor contested these interpretations of the Scanner Agreement by Petitioner. Indeed, it is undisputed in the record that all of the Union's representatives remained silent in the face of these statements by Petitioner's representatives and actually agreed with the comments of the Petitioner's negotiators that honoring the Mailers' picket line would terminate the job guarantees.

On April 17, 1978, the Mailers Union struck The Sacramento Bee. Petitioner's president, Joseph O'Brien and other Union representatives directed Respondent's membership to leave their work stations and observe the Mailers' picket line. Some of the composing room employees named in the Scanner Agreement left their work stations prior to quitting time and subsequently refused to cross the

picket line. Some also joined in the Mailers' picketing activities.

The Petitioner asserted that these activities by Respondent's membership terminated the job guarantees of the Scanner Agreement. The Union disagreed. The parties submitted the question to arbitration before Arbitrator Eaton, where the stipulated issue for the arbitrator was:

> [w]hether the job guarantees provided in paragraph 1 of the 1973 Memorandum Agreement between the Sacramento Bee and Central Valley Typographical Union # 46 ceased for any or all of the employees covered by that agreement by reason of the strike which began April 17, 1978.

On August 10, 1979, the arbitrator issued his decision wherein he noted that the parties' 1973 Scanner Agreement provided that in case of a "strike", the employment guarantees would cease and continuance of the Scanner Agreement would be contingent upon the terms of the "negotiated strike . . . settlement." Based solely on the single, isolated and totally unsupported reference to a "negotiated strike settlement," the arbitrator concluded that it was only after a "primary" strike that the terms of a "strike settlement" could be "negotiated," and because the Union's membership had not engaged in a "primary" strike, their job guarantees had not ceased by reason of the April 17 strike.

Ruling upon the Petitioner's complaint to vacate that arbitration award as well as the Respondent's cross-complaint to confirm, the United States District Court for the Eastern District of California confirmed the arbitration award, and the Petitioner appealed.

Subject matter jurisdiction was conferred upon the district court by Section 301 of the Labor-Management Relations Act, as amended (29 U.S.C. § 185), Petitioner being engaged in commerce and operations affecting commerce within the meaning of Sections 2(6) and 2(7) of the National Labor Relations Act and Section 301 of the Labor-Management Relations Act, as amended (29 U.S.C. §§ 152(6), 152(7) and 185, as well as because employees involved worked in an industry affecting commerce as defined in Section 2(5) of the National Labor Relations Act, as amended (29 U.S.C. § 152(5)). The Petitioner appealed the district court's confirmation of the Eaton arbitration award and that case was docketed Case No. 80-4597 with the Ninth Circuit.[1]

---

[1]While appeal from the original judgment confirming the arbitration award was pending, the district court entered an amended judgment which reaffirmed the original one and also went beyond the issue submitted to the arbitrator and directed the Publisher to reinstate certain striking employees. The Publisher appealed that amended judgment as well, and it was assigned Case No. 81-4117 at the Ninth Circuit Court of Appeals. On July 14, 1982, the Ninth Circuit Court of Appeals vacated that amended judgment as being rendered without jurisdiction. The Publisher does not claim that the Ninth Circuit committed error in vacating the amended judgment in Case No. 81-4117, but rather, this petition deals solely with the Ninth Circuit's affirmation of the district court's confirmation of the underlying arbitration award.

REASONS FOR GRANTING THE WRIT

I

THE LEGAL STANDARD UTILIZED BY THE NINTH CIRCUIT COURT OF APPEALS IN CONFIRMING THE ARBITRATION DECISION IS IN CONFLICT WITH THE STANDARD UTILIZED BY FIVE OTHER CIRCUIT COURTS OF APPEALS

The error claimed in this case on the part of the Ninth Circuit is not complex, but it is extremely important. That is, in affirming the district court's confirmation of the arbitration award, the Ninth Circuit Court of Appeals simply applied the wrong legal standard, a standard which is, in several respects, in conflict with the decisions of the First, Fourth, Sixth, Eighth, and Tenth Circuit Courts of Appeals. A review of the opinion of the court below (App. A) reveals that, without examining the arbitrator's words or the underlying record, the court merely determined that the arbitrator's decision represented a "plausible interpretation of the contract." According to this standard, so long as an arbitration decision's "bottom line" represents an interpretation that is "plausible," the decision is entitled to enforcement without reference to the means the arbitrator used, or to the bases for the arbitrator's decision.

This extremely limited standard of review understates the court's obligation to engage in a meaningful review of arbitration decisions, that is, to examine the arbitrator's words carefully to be certain that the arbitrator remained faithful to his duty to interpret and apply the collective bargaining agreement. By using this "bottom line" approach, the Ninth Circuit denied the Publisher the meaningful review of the arbitration decision to which it was entitled, and rendered a decision contrary to various courts

of appeals which have enunciated far stricter standards for award confirmation. It cannot be doubted that the underlying issue herein, *i.e.*, the standard to be applied by courts in confirming labor arbitration awards, is of great importance to this country, and to its policy favoring voluntary arbitration as the preferred means of settling industrial disputes and avoiding industrial strife. *See United Steelworkers of America v. Enterprise Wheel And Car Corp.*, 363 U.S. 593 (1960). Moreover, national uniformity in such matters is necessary. *See Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957). Accordingly, the exercise of this Court's power of supervision is necessary so that the courts throughout this country will apply a uniform standard in this important area.

The disagreement among the circuits no doubt comes in part from the lack of specific guidance from this Court. Thus, in *United Steelworkers of America v. Enterprise Wheel And Car Corp., supra*, this Court stated the limited role of labor arbitrators as follows:

> . . . [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

363 U.S. at 597. It is clear that labor arbitration awards are legitimate only to the extent that they draw their "essence" from the collective bargaining agreement. How-

ever, the difficulty in applying this standard has resulted in varying degrees of scrutiny among the various courts of appeals.

A. The Opinion Of The Court of Appeals Conflicts With Decisions Of The Fourth, Sixth, Eighth, And Tenth Circuits, Which Deny Enforcement To Arbitration Awards Where the Arbitrator Has Ignored His Own Factual Findings.

The standard applied by the Ninth Circuit on review of labor arbitration decisions, confirming arbitration awards if they are merely a "plausible interpretation," would allow confirmation of a labor arbitration award, even where that arbitrator has ignored his own express factual findings in reaching that decision. The more rigorous standards applied by other courts of appeals would not allow such an occurrence.

The standard enunciated by the Sixth Circuit does not permit the mere analysis of the decision's bottom line to determine its plausibility. Rather, the Sixth Circuit requires a rigorous examination of the arbitration decision and will deny enforcement in situations where the arbitrator has failed to follow his own factual findings. For instance, in *International Brotherhood of Firemen And Oilers, AFL-CIO, Local No. 935-B v. The Nestle Company, Inc.*, 630 F.2d 474 (6th Cir. 1980), the Sixth Circuit reversed the lower court's confirmation of an arbitration award, where the arbitrator ignored his own finding that the grievant was insubordinate. This failure on the part of the arbitrator was fatal to his decision, and the court found no need to examine the decision's bottom line to determine whether or not the interpretation was "plausible."

The Fourth Circuit has a similar rule. For instance, in *Monongahela Power Company v. Local No. 2332, IBEW*, 566 F.2d 1196 (4th Cir. 1976), the arbitrator specifically found that the grievant in question engaged in a work stoppage in violation of the no-strike clause in the collective bargaining agreement. Paying little heed to this finding, the arbitrator nonetheless imposed his own limitations upon the employer's right to discipline for these violations. In so doing, the court held that the arbitrator overstepped his contractual authority.

The Eighth Circuit's rule is in accord. For instance in *Truck Drivers & Helpers Union, Local 784 v. Ulry-Talbert Company*, 330 F.2d 562 (8th Cir. 1964), the collective bargaining agreement enumerated specific offenses including, *inter alia*, dishonesty, which were grounds for discharge. After finding that the grievant engaged in the falsification of time records, the arbitrator nonetheless ordered reinstatement because the penalty was, in his view, excessive. The Eighth Circuit denied confirmation of the award because of the failure on the part of the arbitrator to take heed of his own factual findings.

Finally, in *International Union of Operating Engineers, Local No. 670 v. Kerr-McGee Refining Corporation*, 618 F.2d 657 (10th Cir. 1980), the Tenth Circuit Court of Appeals affirmed the district court's vacation of an arbitration award. There, the contract provided for discharge for abuse or misuse of sick leave benefits. The arbitrator found that the grievant engaged in such misuse, but nonetheless ordered reinstatement.

If this more rigorous standard had been applied in the instant case, it is manifest that Arbitrator Eaton's award would have been denied enforcement. The arbitrator found

that on at least two occasions prior to the parties' April 1978 agreement on a new collective bargaining contract, the Publisher's bargaining representatives warned the Union's representatives that if any of the Union's members honored the Mailers' picket line, then the Union's members would be on strike, and in accordance with the Scanner Agreement, would lose their job guarantees. He also found that the Union's bargaining representatives neither disputed this admonition nor contested these interpretations of the Scanner Agreement. It is also undisputed, and the arbitrator found that the Union's representatives remained silent in the face of these statements by the Petitioner, and actually agreed with the comments of the Publisher's negotiators (App. D, p. D22).

By concentrating on the decision's bottom line, the Ninth Circuit necessarily overlooked that Arbitrator Eaton ignored his own factual findings of the parties' mutual intent. It is axiomatic that it is the purpose of arbitration to glean the intent of the parties as expressed in their collective bargaining agreement. By ignoring his own factual findings that the parties were in complete agreement that the term "strike" in the Scanner Agreement included sympathy strikes, the arbitrator did not remain true to his task but rather dispensed his own brand of industrial justice.

The exercise of this Court's supervisory authority is necessary here so that parties to collective bargaining agreements within the Ninth Circuit receive the same protections given those in other circuits, and are assured that labor arbitrators issue decisions which draw their essence from the collective bargaining agreement, rather than from the individual arbitrator's own notions of justice.

B. The Standard Articulated By The Ninth Circuit Is Contrary To The Standards Articulated In The First And The Sixth Circuits, In That It Would Permit Confirmation Of An Arbitration Award Even Where The Arbitrator's Findings Are Unsupported By The Record Evidence.

By concentrating on the arbitration decision's bottom line, the standard articulated by the Ninth Circuit below makes no room for a meaningful analysis of the record before the arbitrator in order to determine whether the arbitrator's decision has any factual support. That is, under this standard, an arbitrator would be free to ignore all of the evidence in the record, make findings of fact totally unsupported by record evidence, ignore clear and precise contractual terms and to dispense his own brand of industrial justice. Other courts of appeals do not view their role in reviewing arbitration awards as so circumscribed, but rather engage in a meaningful review of the evidence before the arbitrator to determine the existence of record support.

For instance, in *Storer Broadcasting Company v. American Federation of Television and Radio Artists,* 600 F.2d 45 (6th Cir. 1979), *cert. denied,* ..... U.S. ....., 70 L.Ed.2d 641 (1981), the company, prior to the advent of the union, had made voluntary payments into its own profit sharing plan on behalf of its employees. Thereafter, the company and the union entered into a collective bargaining agreement which required the employer instead to make these payments into the union's pension plan, the union having agreed that its members would cease to participate in all aspects of the prior pension plan. Recognizing the possibility for confusion, the collective bargaining agreement

contained a clause representing that the union had fully disclosed to its members the benefits being given up by them in consideration for the company's participation in the union pension plan, and that this arrangement was fully acceptable to the union and its members.

Thereafter, a dispute arose as to the amount of the pay out made by the trustee of the prior plan, the trustee paying the employees their vested benefits only, whereas some employees claimed that they should receive all contributions made on their behalf. The dispute went to arbitration and the arbitrator construed the language referred to above as binding the employer to whatever reasonable interpretation the union had made and communicated to its members. Finding that the union had told the members that they would be entitled to receive all contributions made on their behalf, not merely vested benefits, the arbitrator ordered the employer to pay these amounts. The Sixth Circuit ordered vacation of the award, finding no factual support for the arbitrator's factual finding that the union had made such representations to the employees.

If one were to apply the standard enunciated by the Ninth Circuit to the *Storer Broadcasting* facts, the result would have been far different, for the arbitrator's interpretation there certainly was "plausible" in light of the contract language; language which could be interpreted either way. It was only by going behind the conclusion of the arbitrator, to its factual support, that the Sixth Circuit avoided the unjust result.

Similarly, in *Detroit Coil Company v. International Association of Machinists & Aerospace Workers, Lodge No. 82*, 594 F.2d 575 (6th Cir. 1979), *cert. denied*, 444 U.S. 840

(1979), an issue arose as to the timeliness of the union's submission of the dispute to arbitration. The contract required that the employer and the American Arbitration Association be "notified" within eight working days of a specific act in order to select an impartial arbitrator. While the evidence was undisputed that the letter demanding arbitration bore a date that was within the eight-day period, the arbitrator found that the company did not receive the notification until after that period. Nonetheless the arbitrator let the matter be heard on the merits.

In reversing the district court's confirmation of the arbitration award, the Sixth Circuit noted that there was no evidence in the record to support the arbitrator's conclusion that the company and the union intended to expand the scope of the term "notified" to encompass the mere dating of the letter. Since there was no evidence, the arbitrator exceeded his authority in so holding.

If the Ninth Circuit's rule was applied to the *Detroit Coil* facts, the result would necessarily have been different, as the Ninth Circuit's rule does not contemplate any examination of the record before the arbitrator, nor does it contemplate any determination as to the existence of factual support for the arbitrator's findings. Examining the arbitrator's decision in *Detroit Coil* in a vacuum, it could certainly be said to be "plausible". However, according to the standard applied by the Sixth Circuit, the lack of factual support was fatal to the validity of that award.

The First Circuit enunciated a similar rule in *Electronics Corporation of America v. IUE Local 272,* 492 F.2d 1255 (1st Cir. 1974). There, the arbitrator modified the penalty imposed by the employer on the basis of his finding that the grievant had not received a final suspension prior to

discharge. After analyzing the record before the arbitrator, the court concluded that there was no factual support for the arbitrator's finding that there was no suspension; indeed, the undisputed evidence showed that the pre-discharge suspension had occurred. Since the erroneous factual finding constituted the basis for the arbitrator's decision, the First Circuit concluded that it must be vacated. The low standard for enforceability applied by the Ninth Circuit would necessarily have resulted in affirmation on a case presenting *Electronics Corp.* facts, as the only issue before the arbitrator was whether or not the termination was for just cause. Virtually any ruling by the arbitrator would have been a "plausible interpretation" of the contract.

In the instant case it is apparent that Arbitrator Eaton's decision referred to alleged facts for which there were absolutely no evidentiary support. For instance, page 15 of his decision states:

> A lifetime job guarantee is of extraordinary value to an employee, particularly in an industry of declining employment. If the parties had meant that this benefit was to be lost by honoring the lawful picket line of another union, the employees have a legitimate expectation in being so notified by appropriate contract language. In the scanner negotiations of 1973 the subject was not addressed. All that was said was 'strike,' and *that was all that was meant.* [Emphasis added].

Like the cases cited above, this discussion as to the parties' intent enjoys absolutely no support in the record. Indeed, his finding that the parties intended the term

"strike" to encompass only primary strikes is a mere figment of the arbitrator's imagination, without any factual support. It is only because of the Ninth Circuit's low standard for confirming arbitration awards that such a decision passed muster. Under the standards cited by the courts above, which require an analysis of the record bases for findings, vacation of the Eaton decision would have been mandated.

II

THE OPINION OF THE COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

As stated above, a reading of the opinion of the Ninth Circuit below makes it apparent that the court affirmed the district court's confirmation of Arbitrator Eaton's decision merely by deciding that it constituted a "plausible interpretation of the contract." It is submitted that such a standard understates a court's obligation in cases where a party seeks confirmation of a labor arbitration award, contrary to the teachings of this Court. While it is clear that federal courts are not empowered to interpret substantive provisions of collective bargaining agreements, it is also clear that it is the obligation of the courts to examine the arbitrator's words carefully to be certain that the arbitrator remains faithful to his duty to interpret and apply the collective bargaining agreement. *United Steelworkers of America v. Enterprise Wheel and Car Corp., supra,* 363 U.S. at 597.

Thus, the cornerstone of the standard enunciated by this Court is the *means* by which the arbitrator reached his results. Courts are not to deal with the merits of the

dispute, so long as the arbitrator looks to the collective bargaining agreement as the source of his decision.

On the other hand, the standard applied by the Ninth Circuit is reverse. Under that standard, it does not matter how the arbitrator reached his decision, so long as the bottom line represents a "plausible interpretation." Application of this standard sheds no light on whether the arbitrator remained faithful to his duty to interpret and apply the collective bargaining agreement, or whether his decision was based on extraneous factors. This "plausible interpretation" standard is extremely easy to meet, and gives arbitrators almost free rein to make decisions without regard to the record and without regard to the intent of the parties as expressed in the collective bargaining agreement. Decisions based on passion, supposition, unsupported inference and the individual arbitrator's own notions of industrial justice would be permissible.

As stated by this Court, it is present federal policy to promote industrial stabilization through collective bargaining agreements and a major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in those agreements. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). This policy depends upon voluntary contractual agreements to submit disputes to arbitration. Only if parties can be assured of some means of confining arbitrators' decisions to interpretation and application of the collective bargaining agreement are parties likely to commit themselves to binding arbitration of disputes. A system in which arbitrators are free to transgress their legitimate bounds deters rather than promotes use of this important voluntary dispute resolution mechanism.

To allow the Ninth Circuit's "plausible interpretation" standard to remain is to deny employers and unions within that circuit the right to be assured that labor arbitrators stay within their legitimate bounds of interpreting and applying the collective bargaining agreement.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: October 22, 1982

Respectfully submitted,

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(Appendices follows)

Appendix A

United States Court of Appeals
For the Ninth Circuit

Nos. 80-4597, 81-4117

D.C. No. CV 79-814

McClatchy Newspapers, d/b/a
The Sacramento Bee, a California Corporation,
Plaintiff-Appellant,

vs.

Central Valley Typographical Union No. 46,
International Typographical Union,
Defendant-Appellee.

Opinion

[Filed July 14, 1982]

Appeal from the United States District Court
for the Eastern District of California
Raul A. Ramirez, District Judge, Presiding
Argued and Submitted February 9, 1982

Before: WALLACE, KENNEDY, and CANBY, Circuit Judges.

WALLACE, Circuit Judge:

This case presents consolidated appeals brought by McClatchy Newspapers (the publisher). The first appeal is from a judgment of the district court confirming an arbitration award in favor of Central Valley Typographical Union No. 46 (the union), a local of the International Typographical Union. While that appeal was pending, the district court entered an amended judgment which reaf-

firmed the original decision and made additional directives. The second appeal is from the amended judgment. We affirm the original judgment of the district court and vacate the amended judgment.

I

On November 20, 1973, the parties executed an agreement (the Scanner Agreement), a principal feature of which was the guarantee of lifetime jobs to named composing room employees. The guarantee was subject to the following qualifications:

> [Named] composing room employees will be retained in the employment of the Publisher[ ] . . . for the remainder of their working lives unless forced to vacate . . . through retirement, resignation, death, permanent disability, or discharge for cause; provided, however, in the event of permanent suspension of [the] Publisher's composing room operation, such employment guarantee will thereupon cease. In case of a strike or lockout, such employment guarantee shall immediately cease and continuance of this Agreement will be contingent upon the terms of a negotiated strike or lockout settlement . . . .

On April 17, 1978, the Sacramento Mailers Union Local 31 (the mailers), another local of the International Typographical Union, struck the publisher. Some of the composing room employees named in the Scanner Agreement, observing the mailers' picket line, left their work stations prior to quitting time and subsequently refused to cross the picket line. Some also joined the mailers' picketing activities.

The publisher asserted that these activities terminated the job guaranties [sic] of those employees who partici-

pated in the sympathy strike. The union disagreed. The parties submitted the question to arbitration. The stipulated issue submitted to the arbitrator was

> [w]hether the job guarantees provided in paragraph 1 of the 1973 Memorandum Agreement between the Sacramento Bee and Central Valley Typographical Union #46 ceased for any or all of the employees covered by that Agreement by reason of the strike which began April 17, 1978.

On August 10, 1979, the arbitrator issued his decision. He concluded that the word "strike" in the Scanner Agreement referred only to a primary strike and that the sympathy strike did not terminate the job guarantees. Eight months later the publisher requested that the arbitrator reopen the proceedings to receive new evidence. The arbitrator denied the request. The district court confirmed the arbitration award, and the publisher appealed.

Following the district court's decision, the union renewed its demand that the composing room employees be allowed to return to work. According to the union, the district court's order enforcing the arbitrator's decision compelled immediate reinstatement. The publisher disagreed. On February 6, 1981, the union filed a motion for an order adjudicating the publisher's civil contempt. The publisher opposed this motion contending that neither the arbitration award itself nor the district court's confirmation of the award compelled immediate reinstatement. The district court denied the motion, but, pursuant to Fed. R. Civ. P. 62(c), entered an amended order confirming the original award and requiring the publisher to return the composing room employees to their original or equivalent positions.

This appeal presents the following issues: whether the arbitrator acted within the authority conferred upon him by the parties, whether the arbitrator properly refused to reopen the record, whether the district court had jurisdiction to enter an amended judgment while the appeal of its original judgment was pending, and whether the district court properly ordered reinstatement of the composing room employees.

II

Review of an arbitration award is limited. Plenary review of the merits of an arbitration award would undermine the federal policy of settling labor disputes by arbitration. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). Nevertheless, we may determine whether the parties "agree[d] to give the arbitrator the power to make the award he made," *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), and whether the award drew its essence from the agreement submitted for arbitration. *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra*, 363 U.S. at 597. *See Syufy Enterprises v. Northern California State Ass'n of IATSE Locals*, 631 F.2d 124 (9th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981).

The publisher argues that the arbitrator exceeded his powers when he interpreted the term "strike" to encompass only primary strikes. We disagree. The arbitrator's interpretation of the term was essential to his resolution of the issue submitted to him. By empowering the arbitrator to decide whether the job guarantees ceased by reason of the April 17, 1978, strike, the publisher implicitly

agreed to have the arbitrator interpret the scope of the words "strike or lockout" in the Scanner Agreement. The publisher also argues that the award does not draw its essence from the Scanner Agreement. We again disagree. The arbitrator's award "represents a plausible interpretation of the contract." *Riverboat Casino, Inc. v. Local Joint Executive Board,* 578 F.2d 250, 251 (9th Cir. 1978), *quoting Holly Sugar Corp. v. Distillery Union,* 412 F.2d 899, 903 (9th Cir. 1969).

III

The publisher also argues that the award should not be confirmed because the arbitrator improperly refused to reopen the proceedings to consider newly available evidence eight months after the award issued. We conclude that the arbitrator acted properly. "Arbitrators are not and never were intended to be amenable to the 'remand' of a case for 'retrial' in the same way as a trial judge." *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.,* 442 F.2d 1234, 1238 (D.C. Cir. 1971). Even assuming the availability of new evidence, it would not be appropriate for the arbitrator to consider such evidence and then redetermine the issues originally submitted to him.

> It is [a] fundamental common law principle that once an arbitrator has made and published a final award his authority is exhausted and he is functus officio and can do nothing more in regard to the subject matter of the arbitration. The policy which lies behind this is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect

> a new conclusion. The continuity of judicial office and the tradition which surrounds judicial conduct is lacking in the isolated activity of an arbitrator, although even here the vast increase in the arbitration of labor disputes has created the office of the specialized professional arbitrator.

La Vale Plaza, Inc. v. R. S. Noonan, Inc., 378 F.2d 569, 572 (3d Cir. 1967). *See Mercury Oil Refining Co. v. Oil Workers Int'l Union*, 187 F.2d 980, 983 (10th Cir. 1951).[1]

IV

The publisher further argues that the district court was without jurisdiction to enter its amended judgment. We agree. When a judgment is appealed, jurisdiction over the case passes to the appellate court. The filing of a notice of appeal generally divests the district court of jurisdiction over the matters appealed. *Davis v. United States*, 667 F.2d

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[1]The principle that an arbitration award once rendered is final has been held to contain some limitations. It has been recognized in common law arbitration that an arbitrator can correct a mistake which is apparent on the face of his award, complete an arbitration if the award is not complete, and clarify an ambiguity in the award. *E.g., La Vale Plaza, Inc. v. R. S. Noonan, Inc.*, 378 F.2d 569, 573 (3rd Cir. 1967). Remand to an arbitrator for clarification and interpretation is not unusual in judicial enforcement proceedings. *E.g., Hanford Atomic Metal Trades Council v. General Electric Co.*, 353 F.2d 302, 308 (9th Cir. 1965). Recommitting an issue to an arbitrator for clarification and interpretation does not effectuate an appeal to the arbitrator, a new trial, or an opportunity to relitigate the issue. *Id. See Randall v. Lodge No. 1076, Int'l Ass'n of Machinists and Aerospace Workers*, 648 F.2d 462, 468 (7th Cir. 1981). None of these situations are "within the policy which forbids an arbitrator to redetermine an issue which he has already decided." *La Vale Plaza, Inc. v. R. S. Noonan, Inc., supra*, 378 F.2d at 573. These cases do not apply here because the publisher wishes to introduce new evidence for the specific purpose of convincing the arbitrator that his decision was erroneous.

822, 824 (9th Cir. 1982); *Taylor v. Wood*, 458 F.2d 15, 16 (9th Cir. 1972); *Sumida v. Yumen*, 409 F.2d 654, 656-57 (9th Cir. 1969), *cert. denied*, 405 U.S. 964 (1972). Certain exceptions to the rule have been recognized.[2] Only one of those exceptions, which is codified in Fed. R. Civ. P. 62(c), is arguably applicable in this case. That rule provides in part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. . . .

Rule 62(c) is "merely expressive of a power inherent in the court to preserve the status quo where, in its sound discretion, the court deems the circumstances so justify." J. Moore, 7 Moore's Federal Practice ¶ 62.05, at 62-19 to 20 (2d ed. 1979). It does not restore jurisdiction to the district court to adjudicate anew the merits of the case after either party has invoked its right of appeal and jurisdiction has passed to an appellate court. Rule 62(c) codifies the "long established" and narrowly limited right of a trial court "to make orders appropriate to preserve the *status quo* while the case is pending in [an] appellate court." *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 79 (9th Cir. 1951). "[A]fter appeal a trial court may,

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[2]For example, a district court may retain jurisdiction under specific statutory authority, *Davis v. United States*, 667 F.2d 822, 824 (9th Cir. 1982); a district court may also act to assist the court of appeals in the exercise of its jurisdiction. *Id.*; *see Securities & Exchange Comm'n v. Investors Security Corp.*, 560 F.2d 561, 568 (3d Cir. 1977).

if the purposes of justice require, preserve the *status quo* until decision by the appellate court. . . . But it may not finally adjudicate substantial rights directly involved in the appeal." *Newton v. Consolidated Gas Co.*, 258 U.S. 165, 177 (1922) (citations omitted) (statement of the rule prior to its codification), *citing Hovey v. McDonald*, 109 U.S. 150, 157 (1883), and *Merrimack River Savings Bank v. Clay Center*, 219 U.S. 527, 534 (1911).

In the present case, the district court's amended judgment was not addressed to maintenance of the status quo during pendency of the appeal; in fact, by ordering the publisher to reinstate employees who were not working when the appeal was filed, the amended judgment required a change from the status quo. Furthermore, the district court's order was not limited to the period of the appeal from the initial judgment. If we were to affirm the district court's amended judgment, the order would affect substantial rights of the parties after appeal. The arbitrator's ruling was limited to a finding that the job guarantees survive the sympathy strike; it was not necessarily a determination that discharge of the employees in all circumstances of this case was wrongful or, that even if it were, the remedy of reinstatement is appropriate. The district court's original judgment, confirming the arbitrator's award, therefore was an adjudication only of the survival of job guarantees. In its amended judgment, however, the district court adjudicated the discharge and reinstatement issues, thus materially affecting substantial rights of the parties not decided in its original disposition of the case. These matters must abide further inquiry, either by arbitration or by appropriate judicial proceed-

ings, in which each party has the opportunity for a full and fair presentation of its case. We therefore conclude that the district court's amended judgment does not fall within the authority of Rule 62(c).

The union argues that the general rule governing jurisdiction is inapplicable because the district court's amended judgment falls within the exception articulated in *Hoffman ex rel. NLRB v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976). There we held that an appeal from a contempt order does not divest the district court of jurisdiction to issue further contempt orders based on subsequent violations of a basic injunctive order, even though later orders may effectively modify the original contempt order. We observed that the general rule that an appeal to the circuit court deprives a district court of jurisdiction should not be applied in those cases where the district court has a continuing duty to maintain the status quo. *Id.* "[W]here the court supervises a continuing course of conduct and where as new facts develop additional supervisory action by the court is required, an appeal from the supervisory order does not divest the district court of jurisdiction to continue its supervision, even though in the course of that supervision the court acts upon or modifies the order from which the appeal is taken." *Id.* *Hoffman* is only an extension of the result achieved by Fed. R. Civ. P. 62(c): just as an appeal from an order granting an injunction does not deprive the district court of jurisdiction to alter the injunction for purposes of maintaining the status quo, an appeal of a contempt order issued to force compliance with an injunction should not divest the court of jurisdiction to modify that order to achieve the

same enforcement purpose. Here the appeal came from the district court's confirmation of the arbitration award, and not from a contempt order (or other supervisory action) that was issued to force compliance with that earlier confirmation. The union is incorrect in arguing that this case falls within the limited exception articulated in *Hoffman*.

We therefore conclude that the amended judgment was rendered without jurisdiction and must be vacated. Our disposition of the amended judgment on jurisdictional grounds obviates any need for review of the merits. We therefore decline to decide whether, had there been jurisdiction, the district court could properly have ordered reinstatement.

AFFIRMED IN PART; VACATED IN PART.

Appendix B

United States Court of Appeals

For the Ninth Circuit

Nos. 80-4597, 81-4117

D.C. No. CV 79-814

McClatchy Newspapers, d/b/a
The Sacramento Bee, a California corporation,
Plaintiff-Appellant,

vs.

Central Valley Typographical Union No. 46,
International Typographical Union,
Defendant-Appellee.

Order

[Filed Sept. 22, 1982]

Before: WALLACE, KENNEDY, and CANBY, Circuit Judges

The opinion filed in the above matter on July 14, 1982, is amended as follows:

Beginning at the bottom of the right-hand column on page 3050, and ending at the top of the left-hand column on page 3051, the words "discharge of the employees in all circumstances of this case was wrongful or, that even if it were," are deleted.

Left-hand column, 8 lines from the top, on page 3051, the words "discharge and" are deleted, and the word "issues" is changed to "issue."

Left-hand column, 11 lines from the top, on page 3051, the words "These matters" are changed to "This matter."

The panel as constituted above has voted to deny the petitions for rehearing and for clarification and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing and for clarification are denied, and the suggestion for rehearing en banc is rejected.

Appendix C

United States District Court

Eastern District of California

Civil No. S-79-814 RAR

McClatchy Newspapers, d/b/a
The Sacramento Bee, a California corporation,
Plaintiff,

vs.

Central Valley Typographical Union No. 46,
International Typographical Union,
Defendant.

Judgment

[Filed Dec. 3, 1980]

This case having come before the Court upon cross motions for summary judgment filed by the respective parties; the Court having considered the motions and documents filed in support thereof; the parties having appeared before the Court by their respective counsel on November 24, 1980, and having presented the motions orally; the Court having concluded that this case is proper for final disposition by determination of the motions for summary judgment; and the Court having issued its order at the close of the hearing on November 24, 1980 that Plaintiff's motion for summary judgment be denied and that Defendant's motion for summary judgment be granted;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That judgment be and hereby is entered against Plaintiff on its Complaint, and that the Complaint be and hereby is dismissed with prejudice;

2. That judgment be and hereby is entered for Defendant on its counterclaim, and that the arbitration award of August 10, 1979, attached to the Complaint as Exhibit "C", be and hereby is confirmed and that Plaintiff and its agents are ordered to comply with said award; and

3. That each party bear its own costs of this action.

Dated:

/s/ Raul A. Ramirez
United States District Judge

Appendix D

In Arbitration Proceedings Pursuant to Section 11 of the Agreement Between the Parties

Sacramento Valley Typographical Union No. 46,
Complainant,

and

McClatchy Newspapers,
The Sacramento Bee,
Respondent.

Job Guarantee-Strike Dispute.

Opinion and Decision

William Eaton, Arbitrator

Appearances:

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STATEMENT OF THE CASE

This is an arbitration to determine the following issue as stipulated to by the parties:

> Whether the job guarantees provided in paragraph 1 of the 1973 Memorandum of Agreement between the Sacramento Bee and Central Valley Typographical Union No. 46 ceased for any or all of the employees covered by that Agreement by reason of the strike which began April 17 1978.

Hearing was held in Sacramento on April 4 1979, at which time the parties waived the provisions of the Agreement providing for a board of arbitration, and agreed to submit the issue to the single undersigned Arbitrator for final and binding decision. Submission was completed upon filing of post-hearing briefs, the last of which was received by the Arbitrator on July 20 1979.

The strike which began on April 17 1978 was called by the Mailers Union Local No. 31, which is an independent local union, but, like the typographical union, shares a common affiliation with the international typographical union. The cause of the strike, which was authorized by the international union, was failure to agree on a new collective bargaining agreement. Local No. 46 had reached agreement with the publisher on April 13 1978, the Agreement being effective January 1 1977, although it was not formally signed until June 6 1978.

After the commencement of the mailers' strike, a group of some seven or eight typographical union members remained at work; approximately 30 typographical union members who initially honored the picket line of the mailers subsequently returned to work; the majority of the members of Local 46, approximately 80 including union

officials and members of the scale committee, continued to honor the picket line of the mailers.

In general, it is the position of the employer that the job guarantees provided in the 1973 Memorandum of Agreement, commonly referred to as the Scanner Agreement, ceased for all members of Local 46 for the reason that the local engaged in a strike contrary to the terms of the Scanner Agreement. It is the union's position that honoring the picket line of the mailers union does not constitute engaging in a strike contrary to the Scanner Agreement provisions, and that union members are further protected by the provisions of Section 27(b) of the current collective bargaining Agreement between the typographical union and the Sacramento Bee.

Strike Background

In the spring of 1978 contract negotiations were underway between the Sacramento Bee and three unions, the mailers, the guild, and the typographical union. In general, representatives of each of the other two unions were present when negotiations were being conducted with the newspaper and any one of the three unions. Ray Brown, an international representative of the ITU, was present and negotiated on behalf of both the mailers and the typographical union during these negotiations. A few days after the agreement was reached between the typographical union and the newspaper, agreement was also reached between the guild and the newspaper.

Prior to these agreements being reached there was considerable apprehension that one, or all, of the unions might strike the newspaper. Accordingly, the typographical union met and took a strike vote prior to ultimate set-

tlement, which vote was affirmative for a strike. The union also established a strike committee which, according to union president Joe O'Brien, was appointed on April 9, but never functioned due to the fact that agreement was reached.

Initially the guild, as well as the typographical union, honored the picket line of the mailers. However, after approximately one week members of the guild voted overwhelmingly to return to work, and did so. While members of the typographical union have received "strike benefits" from the international union since the inception of the mailer strike, it appears to be the policy of the international union to provide such benefits to locals observing the picket line of another union as well as to locals engaged in a primary strike.

Union Response

Union president O'Brien testified that he learned definitely on April 16 that there would be a strike of the mailers commencing at 4:00 p.m. on April 17, and that he was therefore at the composing room of the Sacramento Bee at that time. He testified that after the mailers came out and began picketing, most of the printers "filtered out" shortly thereafter. O'Brien went in to speak to the remaining printers. What was said by him, and by another union representative, Manny Gonzales, who attended him, is a matter of controversy.

O'Brien testified that two printers remained in the plant, and that he informed them that there was a picket line outside, and that Local 46 was honoring that line. He did not, according to his testimony, order anyone out or threaten disciplinary action. He did agree, however, that Gonzales

had probably made reference to possible discipline under the ITU laws in response to a question put to him by one of the remaining employees. O'Brien agreed that there had been no picket line when the printers on duty at 4:00 p.m. had come to work, and that they had left before the end of their shift in response to the establishment of the mailers' picket line.

Fred O'Connor, who was one of the printers who stayed at work on April 17 and thereafter, testified that O'Brien spoke to him, and told him that it was his "last chance" to go "out on strike" with the rest of the members. He stated that Gonzales informed him that he would "suffer consequences" of the ITU general laws if he refused. According to O'Connor, assistant chapel chairman Ed Bonilla had told him essentially the same thing earlier in the day, while informing him that Local 46 was going "to go on strike" later that day.

Pre-press department manager Gene Harris testified that he accompanied O'Brien into the composing room when he talked to O'Connor and the other employee, and that he heard what was said. According to Harris, O'Brien informed these employees that they were "expected" to go outside, and that he was giving them a "last warning" to "get out there now." Harris testified that it was not the policy of the newspaper to clear the composing room in the circumstances, that he did not order any printer out, and that to the best of his knowledge no other supervisor did either.

It is agreed that members of the typographical union have appeared on the picket line of the mailers carrying signs in support of their strike. According to O'Brien, the

signs carried by typographical union members have indicated only that the typographical union is honoring the picket line, while those carried by mailers indicate that their union is "on strike." O'Brien testified that he has informed typographical union members never to carry the mailers' signs. Employer witness Harris testified, on the contrary, that he has seen typographical union members carrying the "on strike" signs on "numerous occasions."

Among materials which have appeared in support of the strike there was introduced into evidence copies of a publication called "The Worker Bee", which bills itself as "Sacramento's Only Afternoon Daily." The issue of July 19 1978 carried, among other items, an exortation by union president Joe O'Brien to the printers who remained at work to cease work and join the other union members in observance of the mailers' strike.

After the commencement of the strike an investigating committee was established by the typographical union under the chairmanship of Manuel Gonzales. In his capacity as chairman of the investigating committee, Gonzales sent Mailgrams to the employees who remained at work, dated April 19 1978, notifying them that the president and secretary of Local 46 had filed charges of "Ratting" against them, and that to avoid expulsion from the union they should contact Gonzales. On August 9 1978 all of the employees who had received the Mailgram also received a letter rescinding the Mailgram for the reason, as testified to by O'Brien, that the union had discovered that the ITU laws did not allow such action. O'Brien stated that all seven of the employees who remained at work, including O'Connor, who testified at the arbitration hearing, have offered resignations to the union.

In support of its position herein, the publisher offered into evidence what would appear to be a news release, and which its testimony indicates appeared in the news room of the Sacramento Bee on April 17 1978, the date of the release. The release is attributed to George Randol, administrative officer of the guild, and contains the statement that officials of the printers union had "directed their members" to honor the picket line of the mailers. Also introduced was an unemployment benefit application prepared by typographical union chapel chairman Don Palaia, indicating that his reason for being unemployed was "strike", which indication was made by checking a box opposite that word on the form.

On May 12 1978, in a communication from Keith Fuller, the employer's director of employee relations, the employer notified the union that in its opinion the guarantees referred to in the Scanner Agreement had ceased as a result of the activities indicated above. The joint standing committee ultimately took up the problem, which was deadlocked, leading to this arbitration.

Relevant Provisions of the Agreements

Memorandum of Agreement
between
Sacramento Newspaper Publishers Association
and
Central Valley Typographical Union #46

1. The Sacramento Newspaper Publishers Association, hereinafter referred to as the 'Publishers' agree that all of its composing room employees whose names appear on the attached lists will be retained in the employment of the Publishers in accordance with accepted rules governing

situation holders for the remainder of their working lives unless forced to vacate same through retirement, resignation, death, permanent disability, or discharge for cause; provided, however, in the event of permanent suspension of either Publisher's composing room operation, such employment guarantee will thereupon cease. In case of a strike or lockout, such employment guarantee shall immediately cease and continuance of this Agreement will be contingent upon the terms of a negotiated strike or lockout settlement; and provided further in the event of an 'Act of God' which results in a period of suspension of either Publisher's composing room operation, the job guarantee will be suspended for such period only.

Newspaper Agreement
and
Scale of Prices
Locked Out and Struck Work

Section 27. (*a*) . . .

(*b*) The Union reserves the right to direct its members to refuse to cross a picket line established by Sacramento Mailers Union #31 of the International Typographical Union against the Publisher, signatory hereto, which picket line has been established as a result of a strike authorized under the laws of the International Typographical Union. In the event such action is exercised there shall be no payment for work not performed.

1973 Scanner Agreement Negotiations

In the 1973 negotiations which led to the Scanner Agreement, the union had originally proposed in the introductory paragraph that, in the case of a strike or lockout, the job

guarantees elsewhere provided in the Agreement would be suspended "for such period of temporary suspension of operation only." This language was rejected by the publisher, and the language which appears in the Scanner Agreement, as set forth above, was adopted instead. Though there is some confusion in the testimony, it appears that then international vice president of the typographical union, Joe Bingle, who is now international president, made a statement to the effect that, in light of the language adopted, if the union were to go out on strike it would take the security of the job guarantee clause with it. However, it appears that there was no discussion as to what the result would be should the union honor the picket line of another union during the 1973 negotiations.

A similar scanner agreement had been reached between the Fresno Typographical Union and the Fresno Bee in 1973. On November 21 1978 there was added to the Fresno agreement a document referred to as Supplemental Agreement I. Paragraph I of the Supplemental Agreement reads as follows:

> The attached Scanner Agreement will continue and will be administered as in the past but it will never be a negotiable item for either party in the future negotiations. This is to mean that it will stand by itself regardless of the status of the main collective bargaining agreement. It is further understood that consistent with the negotiators' original intent and in accordance with the written Scanner Agreement, if any individual or group of individuals who have a job guarantee strike or honor a picket line of another union, their job guarantee will cease. The continuance of such job guarantee will be contingent upon the terms of a negotiated strike or lockout settlement.

Industrial relations manager for McClatchy Publications, Jack Lane, testified that this supplemental agreement arose out of the present dispute, and was reached in order to prevent a similar dispute arising in Fresno.

Negotiations for Current Agreement

In the prior agreements between the parties there was no provision similar to that now contained in Section 27(b). The union had originally proposed an individual right to honor the picket line of any union, a proposal which the company rejected. The issue remained unresolved until final agreement was reached on April 13 1978.

Employer testimony is that the language finally adopted is taken from the Fresno Bee contract, which was described as necessary by union international representative Brown in order that the international and local unions would be held harmless should either direct the honoring of a Mailers Union picket line. It would appear that nothing was said during the final negotiating sessions leading to the adoption of Section 27(b) concerning any relationship between that section and the job guarantees in the Scanner Agreement.

Prior to the final negotiating sessions employer representatives had told union representatives that the guarantees of the Scanner Agreement would be lost if the union honored another union's picket line. The union made no response. It is agreed, however, that the parties were operating under an expired agreement at that time, which had not yet incorporated the provisions of 27(b), and that the union proposal concerning 27(b) was still pending. Local union president O'Brien testified that it was for these and other reasons that no union response was made to company

assertions concerning loss of the guarantee during negotiations.

DISCUSSION

Company Argument

The Arbitrator should find that the publisher conditioned the job guarantee provided in the Scanner Agreement on availability for work from the very start of the 1973 scanner negotiations. Not only did international vice president Bingle conceded [sic] that in the event people struck they would "take their job security with them", local president O'Brien eventually agreed in his testimony that company admonitions to the union during the 1977 and 1978 negotiations that a sympathy strike would result in loss of the guarantees were true. The Arbitrator should also conclude that Brown proposed and agreed to the language of Section 27(b) in order to prevent the local and international unions from being held financially liable for directing a sympathy strike.

In honoring the Mailers' picket line the union engaged in what is commonly referred to as a "sympathy strike." This was a "strike" within the meaning of the 1973 Scanner Agreement. In the plain language of that agreement no distinction is made between a sympathy strike and any other kind of strike, nor is any exclusion made for sympathy strikes.

At least one arbitrator has held that a general reference to "strikes" in a contract establishes a prima facie case that sympathy strikes are included. *Westinghouse Transport Leasing Corporation*, 77-2 ARB ¶ 8583, 69 LA 1210 (1977). In the present dispute the union has failed to rebut the prima facie case that a sympathy strike is a strike

within the meaning of the plain language of the Scanner Agreement.

At no time during the 1973 scanner negotiations did the union in any manner suggest that the language adopted should be interpreted to exclude sympathy strikes. Union negotiators thereby acquiesced to the plain and literal meaning of the language adopted. When the publisher first proposed the concept of a job guarantee its negotiator, Keith Fuller, stated in no uncertain terms that any job guarantee would be expressly contingent upon the union members making themselves available for work. The publisher's position that a sympathy strike is a "strike" within the meaning of the Scanner Agreement is consistent with union vice president Bingle's assurance that in the event the members walked out they would take their job security with them. Perhaps the most compelling evidence of the parties' intent in this regard is O'Brien's admission that the Scanner Agreement includes sympathy strikes.

The union acknowledged during the course of the 1976-78 negotiations for a new Newspaper Agreement that the term "strike" as used in the Scanner Agreement includes sympathy strikes by demanding a picket line clause which would have specifically granted to employees the right to engage in sympathy strikes. In its April 6 1978 letter, distributed to all employees and to Local 46 officials, the employer referred to the relevant language of the Scanner Agreement providing for the immediate cessation of the job guarantee in the event of a strike. This was in response to a hypothetical question regarding the effect of "not coming to work."

Thus the parties' statements and conduct subsequent to the execution of the Scanner Agreement reconfirm their

clear intent that the typographical job guarantee would cease when there is a sympathy strike.

This intent is further established by reference to the Fresno Scanner Agreement and the Supplement thereto. The original Fresno Agreement was signed back-to-back with the Sacramento Agreement, in very brief negotiations duplicating exactly what had been agreed upon in Sacramento.

The original intent of the parties in negotiating the Fresno Scanner Agreement was to provide for cessation of the typographical job guarantee in the event that individuals honor a picket line of another union, as restated in the Supplemental Agreement between the parties in November of 1978.

Those National Labor Relations Board decisions holding that a no strike clause does not waive the Section 7 right of a union or its members to engage in sympathy strikes unless the waiver is expressed in "clear and unmistakable" language do not apply to this arbitration, and any reliance by the union on those decisions is misplaced. The job guarantee at issue in this dispute has no statutory basis, the case does not involve any employer action to discharge or discipline any employee, the case does not involve any alleged violation of a no strike clause, and, finally, the Scanner Agreement Preamble involved herein is totally unrelated to the grievance-arbitration provisions of the Newspaper Agreement.

The evidence in this dispute makes it unmistakably clear that the sympathy strike was directed by the union, and was in no manner a spontaneous reaction of the employees involved. The union immediately announced that it was determined to discipline those members who refused to

strike in sympathy with the Mailers, and formed an investigating committee. The charges of "ratting" filed by that committee had their effect. The August 19 revocation of the earlier Mailgram was too little and too late. The union had reaped the maximum coercive effect of the instant disciplines which it had so quickly imposed.

There is ample evidence that the strike was supported by the international union through payment of strike benefits. Under the ITU Book of Laws strike benefits are payable only in the event of a strike by or a lockout against an ITU local.

There is further evidence that members of Local 46 perceived themselves to be "on strike", as shown in unemployment insurance benefit applications and in the close cooperation between the Typographical and the Mailers Unions.

Any further argument by the union that it and its members did not engage in a "strike" is foreclosed by the present Arbitrator's January 25 1979 decision in an arbitration between this publisher and the Central California Newspaper Guild. That decision upheld the publisher's right to hire permanent replacements for various guild members who honored the Mailers' picket line beginning April 17.

The picket line clause contained in Section 27(b) of the Newspaper Agreement does not protect the job guarantees of the Scanner Agreement. This language was taken from the Fresno Bee and ITU Agreement, as contained in that Agreement long before the 1973 Fresno Scanner Agreement. The best evidence of the proper interpretation of Section 27(b) is the meaning attached to the Fresno picket

line clause by the parties thereto. The 1978 Fresno Supplemental Agreement clearly and unambiguously demonstrates that the Fresno picket line language which existed at the time the Fresno Scanner Agreement was agreed upon was never intended to prevent the cessation of the Fresno ITU typographical guarantee in the event of a sympathy strike.

All Section 27(b) does is hold the local and international unions "harmless" in the event that they direct members to honor their sister unions' picket line. Any contention now that that section protects the job guarantees goes far beyond the union's expressed objective in seeking the language. Such an intent was never discussed during negotiations between the parties, nor has the publisher ever agreed to the union's unachieved original picket line demand which would have granted employees the right to honor the picket line of another union.

In any event, the union's reliance on Section 27(b) is foreclosed by Section 64 of the Newspaper Agreement, which specifically provides that the Scanner Agreement and the provisions thereof "shall continue to control the suspension, vacation, cessation or continuance of any job guarantees thereunder."

For these reasons it is respectfully submitted that the Arbitrator should find that the typographical job guarantee contained in the Scanner Agreement immediately ceased as a result of the sympathy strike which began on April 17 1978. Alternatively, at the very least, the Arbitrator should find that said job guarantee immediately ceased for all job guarantee holders who actively participated in the strike.

Union Argument

The words of the 1973 Scanner Agreement upon which the employer attempts to rely simply do not bear the interpretation which it attempts to force upon them. It is clear that the reference to "a strike" is to strike action by the employees covered by the guarantee. The question is whether the composing room employees have themselves engaged in "a strike" within the meaning of the Agreement.

To sustain its interpretation, the company must argue that a strike is synonomous with honoring the picket line of another union. By definition, however, the difference is plain.

The clause itself contemplates that where job forfeiture occurs because of a strike, continuance of the job guarantee will be contingent upon "the terms of a negotiated strike . . . settlement." In the present case the union is not on strike, and is not in a position to negotiate a strike settlement. Were the Mailers to withdraw their picket line, composing room employees would be required to return to work at once under the terms of their existing collective bargaining Agreement.

The distinction between a strike and honoring a picket line is well-established in labor law generally. The courts and the National Labor Relations Board have rejected the argument, except in cases where the contract language was clearly intended to prohibit the refusal of non-striking employees to cross picket lines, that a no-strike clause prohibits non-striking employees from honoring the picket line of a striking union.

A lifetime job guarantee is of extraordinary value to an employee, particularly in an industry of declining employment. If the parties had meant that this benefit was to be lost by honoring the lawful picket line of another union, the employees have a legitimate expectation in being so notified by appropriate contract language. In the scanner negotiations of 1973 the subject was not addressed. All that was said was "strike", and that was all that was meant.

Section 27(b) of the current Agreement makes it clear that there can be no forfeiture of job guarantees in this case. This section for the first time affords contract protection for union members who refuse to cross a picket line. The provision, negotiated just prior to the Mailers' strike, was tailor made to apply to the strike and picket action which occurred four days after its adoption.

Read in conjunction with the 1973 Scanner Agreement, Section 27(b) means that employees with job guarantees will lose their guarantee if they strike, but that they may be directed by the union not to cross the Mailers' picket line. Employees cannot reasonably be invited by contract to take action which destroys their job security, at least without being told in express and unambiguous language that such a consequence will befall them. Not only is there nothing in the contract which provides fair warning, it is conceded that there was nothing in the discussion which led to the adoption of Section 27(b) which bore upon the subject.

Even if doubts regarding the local union's attempt to discipline employees are resolved in favor of the company's position, the union's conduct in support of the strike cannot be converted into strike action within the meaning of the

1973 Scanner Agreement. Nor does receiving out of work benefits or participating in the picketing with signs indicating that the Typographical Union is honoring the Mailers' Union strike make strikers out of composing room employees, anymore than similar activity on the part of students, members of other unions, or supporters from the community would make those groups into strikers when they assist the Mailers.

There is a plain difference between a striker and a non-striker who is supporting a strike, and that difference cannot be blurred by the quantity or quality of the support given.

The negotiating history of the 1973 and the current Agreements does not support the company's position. While international vice president Bingle agreed that in the event the people struck they would lose their job security, nothing was said about a refusal of composing room employees to honor the picket line of another union. Similarly, on April 13 1978, when Section 27(b) was adopted, again nothing was said with respect to its impact upon the 1973 job guarantee provision.

Nor is it material that the language of Section 27(b) was drawn from the Fresno Agreement. The union in the present dispute persuaded the company to accept the picket line language because of the anticipated Mailers' strike in Sacramento.

The most direct testimony of discussions on the present issue consists of statements by company representatives in October of 1977 and February of 1978 to the effect that if composing room employees were to honor a picket line of another union, they would lose their guaranteed jobs, to

which the union did not respond on either occasion. There are several observations to be kept in mind in evaluating this testimony.

First, it has no value in determining the meaning of the 1973 Memorandum of Agreement. Second, the statements preceded the adoption of Section 27 of the current Agreement, and therefore do not reflect the intent of the parties in adopting that clause. If any inference were to be drawn, it would be that the company would have had to reiterate its position in the final negotiating session had it not intended to yield on the point. After all, Section 27(b) gives contractual protection to employees who honor picket lines, and on its face such protection would appear inconsistent with the position that loss of a guaranteed job would occur by honoring the Mailers' line.

Finally, the union's representatives declined to respond for a very interesting reason. They were uncertain as to whether a refusal to cross a picket line in the absence of contractual protection, which the union did not have in the prior agreement, might be regarded as cause for discharge under that contract, thus defeating the job guarantee because of "discharge for cause." Moreover, the union at that time was concerned about the possibility of its own strike. Hence, it was decided not to argue with the company.

For all of the foregoing reasons, it is respectfully submitted that decision in this case should be in favor of the union's position.

Conclusions

The crucial language in this dispute is contained in the 1973 Scanner Agreement. That language provides that, in case of a "strike" the employment guarantee will cease, and

the continuance of the Scanner Agreement will be contingent upon the terms of a "negotiated strike . . . settlement." The combined reference to a "strike" and a "negotiated" settlement clearly implies a primary strike in which the terms of a collective bargaining agreement are in dispute. If something more is meant, the employer in this dispute bears the burden of proof.

There remains little doubt that the union directed its members in the most forceful terms to observe the Mailers' picket line. Nor is there any reason to disagree with the employer's argument that, by the time the original Mailgrams threatening disciplinary action were rescinded the full effect of the union's support had been achieved. This conclusion, however, sheds little light on the contractual issue to be determined.

It would also seem fairly clear that Section 27(b) is not applicable to this dispute. There is nothing on the face of that provision which indicates any intent to relate it to the job guarantee of the Scanner Agreement, nor is there any evidence that such a connection was ever discussed during negotiations which led to the adoption of Section 27(b). Whatever guarantees are provided by 27(b), we must conclude, run to matters other than the present issue.

Nor are the analogies suggested from NLRB decisions, or from the precedents offered by the publisher in its brief, particularly helpful. We are not concerned with any statutory right, with an allegation that a no-strike clause has been violated, or with discharge for cause related to strike activities of any sort. If these cases offer any assistance, it would be limited to the very broad recognition that distinctions are often made between a primary strike and refusal to cross the picket line of another union, whether

that be termed a sympathy strike or honoring the picket line.

The *Westinghouse* case, upon which the publisher places considerable reliance, involves too many elements not present in the instant dispute to be particularly helpful. For example, it involves a no-strike pledge and an obligation to resort to all reasonable means under the agreement to resolve the controversy before resort to "strike, lockout, tieup, or legal proceedings." For these and similar reasons the arbitrator's conclusion that "a sympathy strike is a strike" must be taken in context of that dispute and does not necessarily represent a generally accepted rule.

Nor does the Guild decision of the present Arbitrator, cited by the publisher, furnish guidance in this dispute. There was nothing in that dispute remotely resembling the job guarantee clause of the Scanner Agreement upon which the present dispute turns. Hence, that opinion does not contain any discussion which would bear upon the central issue in this dispute.

Reference to similar language in the Fresno Agreement, while interesting, is not, upon close examination, dispositive of this dispute. While the Supplemental Agreement of November 21 1978 purports to affirm the "original intent" of the 1973 agreement, that affirmation was expressed in circumstances quite dissimilar to any existing in Sacramento. In particular, it was part of an agreement that the Fresno Scanner Agreement would never be a negotiable item for either party in the future. Moreover, it was undisputed that the particular language of the Supplemental Agreement in Fresno specifically providing that honoring the picket line of another union would lead to loss of the

job guarantee was adopted as a result of the present dispute, and to assure that no such dispute could arise in Fresno. Thus it would seem wise to resist the temptation to recognize any nascent doctrine of retroactive original intent which might lurk in the arguments presented.

The publisher's letter to all employees, dated April 6 1978, upon which the publisher relies in part, does little to advance its argument. In response to a hypothetical question regarding the effect on the lifetime guarantee of an ITU employee if he does not come to work, the company merely quotes the contract language at issue.

The publisher's admonitions during negotiations for the present Agreement, on the contrary, must be examined most carefully particularly the allegation in relation to those admonitions that local union president O'Brien agreed with them. There is no dispute but that the employer representatives on the negotiating team stated at least twice that honoring the picket line of another union would cause loss of the job guarantees. Nor is it disputed that union representatives remained silent in the face of these statements.

At the time these statements were made the parties were operating under an expired agreement, and were negotiating terms which later resulted in Section 27(b), a new provision in the Agreement. Moreover, it was not clear during these negotiations whether any, or all, of the unions involved might ultimately strike over terms of the new Agreement. Union testimony is that, amidst these and possibly other uncertainties, it was decided simply not to argue with the company. Hence, union negotiators remained silent.

It was regarding such circumstances as these that O'Brien stated that "as matters stood at that particular time" he probably agreed with the comment of the company negotiators. In all of these circumstances, and in particular in the absence of a valid collective bargaining agreement, O'Brien's comments in this regard simply do not amount to agreement with the company's stated position. Nor, in the same circumstances, can the company's unilateral statement of position be considered a binding interpretation of the Agreement.

Returning to the language of the Scanner Agreement of 1973, reference is clearly made to a primary strike situation, whereas reference is not clearly made to the honoring of the picket line of another union. Similarly, the references made during negotations [sic] of the 1973 agreement by the parties, and particularly by vice president Bingle, also clearly related to a primary strike, but did not clearly relate to the honoring of a picket line of another union.

The value of an agreed upon lifetime guarantee of work is readily apparent. Where such a benefit is to be deleted or withdrawn such action must have clear contractual sanction. The employer in this dispute has been unable to demonstrate that such sanction was intended by the parties or that it presently exists.

DECISION

For the reasons set forth in the foregoing Opinion the job guarantees provided in Paragraph 1 of the 1973 Memorandum of Agreement between the Sacramento Bee and the Central Valley Typographical Union No. 46 did not cease for any of the employees covered by that Agreement by reason of the strike which began April 17 1978.

/s/ Wm. Eaton
William Eaton, Arbitrator

August 10 1979

Appendix E

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

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No. 82-723

In the Supreme Court of the United States

OCTOBER TERM, 1982

MCCLATCHY NEWSPAPER, d/b/a
THE SACRAMENTO BEE,
Petitioner,

v.

CENTRAL VALLEY TYPOGRAPHICAL
UNION NO. 46, INTERNATIONAL
TYPOGRAPHICAL UNION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION

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BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

QUESTION PRESENTED

Whether the Court below properly concluded, on the record before it, that an arbitration award made pursuant to a collective bargaining agreement constituted a permissible determination of the contract interpretation question presented to the arbitrator.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties to the proceeding in the Court below are named in the caption of this Opposition.

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OPINIONS BELOW

The opinion of the Court below is reported at 686 F.2d 731. The opinion and the order amending the opinion and denying the petitions for rehearing are reproduced as appendices to the Petition.

The judgment of the United States District Court for the Eastern District of California and the bench decision of that Court are not officially reported. The judgment is reproduced as an appendix to the Petition. The bench decision, in which the Court explained the grounds for the judgment, is reproduced as an appendix to this Opposition.

JURISDICTION

The Petition for Writ of Certiorari was timely filed in this Court on October 22, 1982, the petitions for rehearing in the Court below having been denied on September 22, 1982. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The statute under which the district court and the court below were authorized to review the arbitration award in this case is Section 301 of the National Labor Relations Act, as amended (29 U.S.C. Section 185), and is reproduced as an appendix to the Petition.

STATEMENT OF THE CASE

Petitioner and Respondent, hereafter referred to as the Union, have had a long collective bargaining relationship covering Petitioner's composing room employees at the Sacramento Bee, a metropolitan daily newspaper. In 1973, when Petitioner instituted a program to convert its composing room from traditional "hot metal" printing to a modern photocomposition technique, the parties entered into an agreement which, insofar as is relevant here, provided for lifetime guaranteed jobs to a certain number of composing room employees. The guarantee, however, was subject to specified qualifications, such as retirement, resignation, death, permanent disability, and discharge for cause. In addition, and of particular importance in this case, the agreement provided:

> "In the case of a strike or lockout, such employment guarantee shall immediately cease and continuance of this Agreement will be contingent upon the terms of a negotiated strike or lockout settlement."

On April 17, 1978, a different labor organization which represented a number of Petitioner's employees, Sacramento Mailers Union Local 31, instituted a strike for a new contract. A substantial number of the Union's members honored the picket line and remained off the job. The Union encouraged its members not to work during the strike.

During the course of the Mailers' strike, a dispute arose between the parties as to whether the Union's members who honored the Mailers' picket lines had forfeited their lifetime job guarantees. The controversy was submitted to an arbitrator pursuant to the grievance provisions of the collective bargaining agreement then in effect between the parties. The issue presented to the arbitrator was phrased as follows:

> "Whether the job guarantees provided in paragraph 1 of the 1973 Memorandum Agreement between the Sacramento Bee and Central Valley Typographical Union No. 46 ceased for any or all of the employees covered by that Agreement by reason of the strike which began on April 17, 1978."

The arbitrator's decision was issued on August 10, 1979 (Pet. App.D). As shown in the decision, the controversy between the parties centered on the question of whether a "strike" which would bring about forfeiture of the job guarantees under the 1973 agreement included the action of the Union's members in honoring the picket lines of another striking union. After a full discussion of the background facts and the respective positions of the parties, the arbitrator's decision concludes that the contractual term "strike" is limited to a primary strike, i.e., a strike by the contracting union, and that the job guarantees of the Union's members who honored the picket lines of the Mailers' Union were not terminated (Pet. App.D, p.24).

The interpretation given to the contractual language by the arbitrator was grounded principally upon "[t]he combined reference to a 'strike' and a 'negotiated' settlement" in the agreement (Pet. App.D, p.20). The arbitrator reasoned that the interrelationship between these terms "clearly implies a primary strike in which the terms of a collective bargaining agreement are in dispute" (*ibid.*). The arbitrator noted that Petitioner had not adduced any evidence that a contrary meaning was intended by the parties (*id.* p.23). On the contrary, the decision points out that during the negotiation of the 1973 agreement, there were references by the parties which "clearly related to a primary strike, but did not clearly relate to the honoring of a picket line of another union" (*ibid.*).

The instant proceeding was initiated by the filing of a petition to vacate the arbitration award in the United States District Court for the Eastern District of California. The Union counterclaimed for confirmation of the award, and the matter was submitted upon cross motions for summary judgment.

The district court announced its decision from the bench at the hearing upon the cross motions. Although observing that judicial review of arbitration awards is of limited scope, the court indicated its independent agreement with the arbitrator's interpretation of the critical contract language. In discussing the question, the court referred to the arbitrator's decision as "the logical interpretation", and added that "this court is greatly persuaded that . . . where in fact the Union honored the lawful picket line of the Mailer's Union, this did not constitute a strike and was not in violation of what I can refer to as the no-strike provision of the . . . Agreement" (App. p. 7). A judgment confirming the award was issued (Pet. App.C).

The court below affirmed the district court's judgment. Noting the restricted scope of review which is applicable to proceedings to vacate arbitration awards issued under collective bargaining agreements, the opinion of the Ninth Circuit explains its decision in the following paragraph (Pet.App.A, p.4-5):

> The Publisher argues that the arbitrator exceeded his powers when he interpreted the term "strike" to encompass only primary strikes. We disagree. The arbitrator's interpretation of the term was essential to his resolution of the issue submitted to him. By empowering the arbitrator to decide whether the job guarantees ceased by reason of the April 17, 1978, strike, the publisher implicitly agreed to have the arbitrator interpret the scope of the words "strike or lockout" in the Scanner Agreement. The publisher also argues that the award does not draw its essence from the Scanner Agreement. We again disagree. The arbitrator's award "represents a plausible interpretation of the contract." *Riverboat Casino, Inc. v. Local Joint Executive Board,* 578 F.2d 250, 251 (9th Cir. 1978), quoting *Holly Sugar Corp. v. Distillery Union,* 412 F.2d 899, 903 (9th Cir. 1969).[1]

REASONS FOR DENYING THE PETITION

The Petition does not present a question which warrants determination by this Court. The underlying arbitration award which Petitioner contends to constitute an incorrect interpretation of a collective bargaining agreement was issued on the basis of uncontested facts and upon a full

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1. As stated in the Petition (p.6, n.1), the court below also reversed the district court's decision on a separate question, namely, whether the district court had jurisdiction following the appeal from the judgment confirming the arbitration award to amend its judgment and provide for additional relief. No question is presented to this Court concerning the amended judgment of the district court.

statement of the arbitrator's reasons. Both the district court and the court below expressly followed the well established guidelines of this Court in respect to the review to be given arbitration awards in labor agreements. The arbitrator decided the question submitted to him, and two courts have found that the decision was well within his arbitral authority. As we show below, this case involves no more than a conventional application of the review standard pertaining to arbitration awards which is stated in *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

1. Contrary to the suggestion made in the Petition (pp. 9-11), the decision below does not conflict with decisions of other circuits relating to the proper standard of judicial review of arbitration awards. Petitioner argues that other circuits have adopted a rule which requires reviewing courts to analyze arbitration decisions for internal consistency, and to vacate an award upon finding that an arbitrator "has ignored his express factual findings" (Pet.p.9). The decisions cited by the Petition, however, establish no such rule.[2] On the contrary, each is a case in which the arbitrator failed to comply with an express contractual limitation upon his remedial authority. The opinions in these cases are expressly premised upon that consideration, which is of course an established basis for refusing enforcement of an award. *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 597-598 (1960). None of the decisions stand for the proposition, as asserted by Petitioner, that a reviewing court must ex-

2. The decisions referred to in the text, cited at pages 9 and 10 in the Petition, are: *International Brotherhood of Firemen and Oilers, Local No. 935-B v. The Nestle Company*, 630 F.2d 474 (C.A.6, 1980); *Monongohela Power Co. v. Local No. 2332, IBEW*, 566 F.2d 1196 (C.A.4, 1976); *Truck Drivers Local 784 v. Ulry-Talbert Co.*, 330 F.2d 562 (C.A.8, 1964); and *International Union of Operating Engineers Local 670, v. Kerr-McGee Refining Corp.*, 618 F.2d 657 (C.A.10, 1980).

amine the arbitration record to find evidentiary support for an arbitrator's findings and approve the logic of his reasoning as a condition to enforcing his award.

There is no question in the present case pertaining to a contractual limitation on the arbitrator to decide the dispute which was submitted to him. The narrow disagreement between the parties was whether the contractual term "strike" was intended to mean only a primary strike, or whether it was intended to include a refusal to work in order to honor picket lines of another striking union. Both the submission agreement in the arbitration proceeding and the grievance provisions of the underlying collective bargaining agreement authorized the arbitrator to resolve this disagreement, and that is all he did. Enforcement of his award is accordingly completely consistent with decisions which vacate awards which exceed the contractual authority of an arbitrator. The asserted conflict simply doesn't exist.

2. Petitioner argues that the correct standard for courts to apply in cases involving the validity of an arbitration award is one which "requires a rigorous examination of the arbitration decision" to ascertain whether there is consistency between the award and underlying findings, and whether there is evidentiary support for the findings (Pet. p. 9, 10-14). Apart from the fact that this question, as we show below, is not presented in this case, the contention is at odds with this Court's decision in *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960). As the Court there pointed out, "Arbitrators have no obligation to the court to give their reasons for an award." 363 U.S. at 598. Petitioner's argument of course presupposes that arbitrators have precisely that obligation, embellished with the further obligation to make factual findings and state reasoning which will withstand judicial scrutiny. It was just this kind

of approach to arbitration awards which this Court noted, in *United Steelworkers v. Enterprise Corp., supra,* "would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract" 363 U.S. at 598-599. As the Court added (363 U.S. at 599):

> "This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final... It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

For a discussion of whether factual findings in arbitration awards are required, see *Virgin Island Nursing Association v. Schneider,* 668 F.2d 221 (C.A.3, 1981).

3. In any event, this case scarcely presents an appropriate occasion for a redefinition of the scope of judicial review of arbitration awards. All that is involved is a question of contract interpretation in a context of facts which are uncontested. As we have stated, the matter was submitted to the district court upon cross motions for summary judgment. Apart from the language of the agreement which was in dispute, there was very little in the record before the arbitrator of a factual nature that bore upon the question of interpretation.

The only evidence to which the Petition points in its attempt to characterize the question in this case as one involving a lack of evidentiary support for an arbitrator's findings is testimony concerning the 1978 contract negotiations, some five years after the relevant agreement was executed. The reference is to the fact that in discussions preceding the strike of the Mailers Union, representatives

of the Union remained silent in the face of statements by Petitioner's representatives that employees would lose their lifetime jobs if they honored a Mailers Union picket line. The arbitrator concluded that the silence of the Union representatives did not "amount to agreement with the company's stated position" (Pet. App.D, p.23) for several reasons. First, the Union members were at that time working under an expired contract which did not provide protection for employees who honor a picket line. There was apprehension that a refusal to cross the picket line of the Mailers Union might be "just cause" for discharge, which would constitute an independent reason for termination of the job guarantees. In addition, as noted by the arbitrator, there was uncertainty at the time "whether any or all, of the unions involved might strike over terms of the new Agreement" (Pet. App.D, p.22). The arbitrator found that rather than conceding to Petitioner's argument, the silence of the Union's representatives reflected simply a disinclination "to argue with the company" *(ibid.)*.

On the basis of this testimonial evaluation, Petitioner argues somewhat inconsistently that the arbitrator has "ignored his own factual findings of the parties' mutual intent" (Pet. p.11), and that the arbitrator's interpretation of the agreement is "without any factual support" (Pet. 16). Neither assertion is valid. First, the arbitrator did not find that the Union acceded to Petitioner's position by its silence during the 1978 negotiations. Rather, the finding on this point is that the Union representatives remained silent because they did not want to argue, not because they agreed with their employer. Second, this is not a case in which there is an absence of evidence to support the interpretation which the arbitrator gave to the contract. The arbitrator's

interpretation was based on his reading of the contract language, having found that there was very little else to guide him.

The result is that Petitioner has ascribed to the court below a position on the scope of review in arbitration cases which is neither expressed in the court's opinion nor required by the record before it. The arbitration award in this case would have to be sustained no matter how plenary the scope of judicial review to which it might be subjected. In short, Petitioner requests this Court to review a question which is simply not presented either by the record in this case nor by the decision of the court below.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

November 1982.

BEESON, TAYER & SILBERT
DUANE B. BEESON
Attorneys for Respondent

Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE RAUL A. RAMIREZ,
JUDGE

Civil NO. S-79-814-RAR

McClatchy Newspapers, d/b/a
The Sacramento Bee, a California
corporation,
Plaintiff,

vs.

Central Valley Typographical
Union No. 46 International
Typographical Union,
Defendant.

REPORTER'S TRANSCRIPT

CROSS MOTIONS FOR
SUMMARY JUDGMENT

NOVEMBER 24, 1980

APPEARANCES:

CIVIL NO. S-79-814-RAR:

For the Plaintiff:

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For the Defendant:

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Sacramento, California
Monday, November 24, 1980

THE CLERK: Civil S-79-814, McClatchy Newspaper versus Typographical Union, cross-motions for summary judgment.

MR. ROSS: Your Honor, the same law firm and same attorney appearing in behalf of McClatchy.

THE COURT: All right. Mr. Ross.

For the Union?

MR. BEESON: For the Union, the firm of Beeson, Tayer, Kovach & Silbert, Duane Beeson, for defendants.

THE COURT: As indicated, this matter is on today's calendar for cross-motions for summary judgment.

Counsel, would you like to be heard?

MR. ROSS: Well, Your Honor, I think our papers make our position very clear and we'd be willing to submit it on the basis of those papers.

THE COURT: Mr. Beeson?

MR. BEESON: Unless Your Honor has questions, I think that the papers are comprehensive in their treatment of this matter.

THE COURT: All right. Since counsel has given the Court some latitude, at least for the record, since I presume there are interested parties, let me at least give a brief rundown of what is before the Court. It appears from the papers on file that this ligitation arises out of a strike at

The Sacramento Bee in April of '78. In the early seventies, The Sacramento Bee, as I understand it, was in the process of changing from what is known as hot metal printing to a cold-type printing system. Changing, of course, from the old type machines to the more modern comupter-type centers. In the changeover, several members of the defendant Union became, to use the word very politely, expendable in terms of employment. I presume the basis for the agreement was to protect these expendable employees.

The plaintiff and defendant entered into an agreement giving these certain named employees certain job protections. For lack of a more appropriate term, I will refer to it as the "Scanner Agreement." Of course, counsel, feel free to interrupt me if I've interpreted something in error.

In essence, the Scanner Agreement indicated that these certain employees would not lose their jobs, would be protected to a certain extent, if, in fact, and as long and until the Union went out on strike, and of course, the most important term and the statement just made by the Court was the term "strike," and its meaning in the literal as well as figurative sense.

The agreement was executed, and I presume there were no other problems, none that the Court is to be concerned with, until and about April of—I believe it was April of '78, when the Mailers who were without a contract went out on strike. The defendant Union honored the mailers' picket lines, refused to cross the picket lines, and subsequently, was informed by the plaintiff—I'll refer to the plaintiff continuously as "The Bee" as opposed to McClatchy—The Bee indicated and informed the defendant Union that it considered the Union to be out on strike as that term was used and meant to be used in the Scanner Agreement. That as such, the employees who had been previously protected

under the Scanner Agreement were to lose their job protection. The Union, of course, took up some disagreement with The Bee's interpretation of the term "strike." The matter was submitted to arbitration in accordance with the Collective Bargaining Agreement and by way of written opinion, the arbitrator found that the word quote strike end quote as used in the Scanner Agreement referred to a primary strike and not to what I will refer to, for lack of a better term, as a sympathy strike, and that as such, the refusal to cross picket lines did not constitute a strike and therefore, the Scanner Agreement should be enforced and that those employees should regain the protection that they initially sought and initially were granted under the agreement.

The Plaintiffs thereafter brought this present action seeking to vacate the award of the arbitrator on the grounds, first, that the arbitrator had exceeded his authority accorded to him by the parties under the agreement; that his award, in fact, failed to draw its essence from the Collective Bargaining Agreement.

Secondly, that the arbitrator was guilty of misconduct in refusing to hear evidence pertinent and material to the controversy submitted by the parties. Obviously, the Court has jurisdiction under the matter under 301 of the Labor Management Relations Act, and obviously, without going into some detail, since counsel has been here before, the parties are aware of the limited policies of this Court in interfering with the actions of the arbitrator, save and except where it has been demonstrated that, in fact, the award of the arbitrator fails to draw essence from the meaning of the agreement and/or has exceeded its bounds or has been guilty of some misconduct, such as failing to hear evidence that might be dispositive of the case or having

some conflict of interest that perhaps was not apparent on the record.

I am concerning myself, gentlemen, more or less with the allegation that the arbitrator in his award failed to draw essence from the parties' Collective Bargaining Agreement.

The parties have submitted the matter. Therefore, without further ado, in reviewing the various and voluminous cases in the Ninth Circuit, obviously, the Court will uphold the arbitrator's award if, in fact, that award represents a plausible interpretation of the parties' contract in the context of the parties' conduct. The agreement that I am faced with today indicates that:

> "In case of a strike or lockout, such employment guarantee shall immediately cease in continuance of this agreement"—
>
> Referring, of course, to the Scanner Agreement—
>
> "—will be contingent upon the terms of a negotiated strike or lockout settlement."

The arbitrator, of course, as I've indicated, interpreted this language to mean that the Union would lose the Scanner Agreement protections if, in fact, the Union itself went out on strike, and based his interpretation upon the phrase, I presume, "Upon the terms of a negotiated strike and/or settlement." Meaning that, obviously, a person cannot settle something unless they actually went out on strike seeking something. Therefore, the arbitrator found that the sympathy strike did not purport and did not conform to the word "strike" as used in the agreement and ordered the employees to maintain the protection that they had previously had.

I was concerned, gentlemen, with the interpretation of the word "strike." Justice Douglas, as you are well aware,

in his numerous decisions in this area, always felt that these matters were best left to the so-called experts. Persons who are in the field, who have had more years than this Court probably deems to live in the field, has had daily contact with both parties, is aware of the contact of the parties, the meanings that are given to certain terms of the parties, and I think it is for that specific reason that the Ninth Circuit has followed most of the circuits in the finding that the award of the arbitrator will always be upheld if it represents a plausible interpretation of the parties' contract. Why? Because the arbitrator is in a better position to define and understand the terms of the contract as opposed to the Court who is usually faced with a cold, black and white lettering of a contract which may have hundreds of interpretations, depending upon the ability of the attorney arguing before the Court, the background, be it limited or otherwise, of the Court in interpreting contracts, and the hundreds of thousands of case law, all that define white as being black and black as being white and doesn't really give assistance to the Court.

However, I believe in this case, I am not left hanging on the limb. I believe that the award of the arbitrator does, in fact, draw essence from the meaning of the term "strike" as used in the Scanner Agreement. I believe that the logical interpretation is upheld and is specifically shown by other case law. Specifically, I have in mind the case of David O'Riley versus National Labor Relations Board, which is a 1975 Ninth Circuit opinion at 510 Fed 2d, 428. It, in fact, interpreted and was faced with the definition of the term "strike" and the Court of Appeals held that the no strike provisions of a Collective Bargaining Agreement had no application to honoring a sister union's lawful picket line, or to put it in plain English, where one union honored the

sister union's lawful picket line, this did not violate the no-strike provisions of the Collective Bargaining Agreement.

Applying that rationale to the opinion and the decision of the arbitrator, this Court is greatly persuaded that, likewise, here, where in fact the Union honored the lawful picket line of the Mailer's Union, this did not constitute a strike and was not in violation of what I can refer to as the no-strike provision of the Scanner Agreement.

For that reason, the Court does find, number one, that the award of the arbitrator does, in fact, draw its essence from the parties' Collective Bargaining Agreement.

Number two, in reviewing the allegations made that, in fact, the arbitrator was guilty of misconduct in refusing to hear evidence pertinent and material to the controversy, the Court is not satisfied that there was such misconduct. The Court does not feel that it has been provided with sufficient evidence to demonstrate, one, the type of new evidence that would be admitted. Two, what affect the so-called new evidence would have. Three, I'm not satisfied that, in fact, there has even been a timely and proper allegation that such new evidence exists.

For this reason and all other reasons as more particularly stated, the motion of the plaintiff for summary judgment, that is, of McClatchy, is denied. The motion for summary judgment on behalf of the Typographical Union and the Union in its entirety will be granted. The Court does affirm the award of the arbitrator's decision in its entirety.

I would ask Mr. Beeson on behalf of the Union to please be so kind as to prepare the order in accordance with the Court's finding.

Thank you very much, gentlemen.

MR. BEESON: Do you wish separate findings of fact and conclusions of law prepared or will a statement from the bench be sufficient?

THE COURT: I believe the statement from the bench is sufficient, since I'm dealing with cross-motions for summary judgment. I don't feel that the Federal Rules of Civil Procedure require either an opinion and/or the necessary findings, since it is under specific ruling of summary judgment.

As indicated, the motion on behalf of the plaintiff is denied. For the defendant, granted. The award of the arbitrator is affirmed.

MR. ROSS: Thank you, Your Honor.

MR. BEESON: Thank you very much.

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA }
COUNTY OF SACRAMENTO } ss.

This is to certify that I was present in court as Official Court Reporter during the proceedings had in the before-entitled case on Monday, November 24, 1980 and Monday, November 24, 1980; that I reported in shorthand the proceedings had in said matter, and thereafter reduced my shorthand notes so taken to typewriting and the foregoing pages 4 to 37, inclusive, contain a full, true and correct statement and record of said proceedings.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, this 29th day of December, 1980.

AMANDA VINE
AMANDA VINE
Certified Shorthand Reporter

Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-723

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

MCCLATCHY NEWSPAPERS, d/b/a
THE SACRAMENTO BEE,
Petitioner,

VS.

CENTRAL VALLEY TYPOGRAPHICAL UNION No. 46,
INTERNATIONAL TYPOGRAPHICAL UNION,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply To Respondent's Opposition To Petition For Writ Of Certiorari

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Reply To Respondent's Opposition To Petition For Writ Of Certiorari

In this reply Petitioner McClatchy Newspapers, d/b/a The Sacramento Bee ("Publisher" or "Petitioner") addresses the points raised in the opposition to petition ("Opp") filed by Respondent Central Valley Typographical Union No. 46, International Typographical Union ("Union" or "Respondent").

In its opposition, the Union does not dispute that the issue raised (i.e., the proper standard of review of labor arbitration awards), is important to this country's labor relations system, nor does it dispute that this is an area in which national uniformity is particularly necessary, requiring this Court's exercise of its supervisory authority

over the lower courts within the federal system. More significantly, the Union fails to address squarely the issue before this Court on Petition for Writ of Certiorari. That is, whether the "plausible interpretation" standard utilized by the Ninth Circuit Court of Appeals in reviewing labor arbitration awards is in conflict with this Court's decisions as well as decisions of the other courts of appeal.

It is not surprising that the Union did not directly address the propriety of the "plausible interpretation" standard, or the failure of this standard adequately to address the proper role of courts in reviewing labor arbitration awards. The Union's unexplained silence on these key issues speaks forcefully in favor of granting the Petition. Nowhere does the Union refute that this standard is improper and suffers from two major infirmities. It constitutes an improper injection of the courts into the merits of arbitration disputes, and at the same time results in a lack of meaningful review by courts of arbitration awards to determine whether the arbitrator remained faithful to his charge to interpret and apply the collective bargaining agreement, rather than to dispense his own brand of industrial justice.

Regarding the first infirmity of this "plausible interpretation" standard, the Union agrees that it is not the role of the courts to interpret and apply collective bargaining agreements or to inject themselves into the merits of the underlying disputes. Nonetheless, it is apparent, and the Union admits (Opp p. 4) that this is inherent in the "plausible interpretation" standard, and was precisely what occurred below. The courts below themselves interpreted the scanner agreement's terms and confirmed the award because the courts' interpretation concurred with the arbi-

trator's. This approach is simply wrong and contrary to the teachings of this Court, as it is not the role of courts to sit as second-level arbitrators reviewing the merits or the "plausibility" of the arbitrator's decision. *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564, 568 (1960).

Aside from improperly meshing the courts into the merits of disputes, the "plausible interpretation" standard understates the obligation of the courts to review the means used by the arbitrator to reach his results in order to determine whether or not the arbitrator remained faithful to his duty to interpret and apply the collective bargaining agreement, rather than dispense his own brand of industrial justice. The Union does not seriously address this infirmity. The Ninth Circuit's "plausible interpretation" or "bottom line" approach would leave the arbitrator free to ignore all of the evidence contained within the record, so long as the decision's "bottom line" represented a plausible interpretation. Under this standard, it would not be germane for a court to examine whether the arbitrator based his decision on improper and extraneous factors. Indeed, this "plausible interpretation" standard is so easy to meet that it gives arbitrators free rein to make decisions without regard to the record and without regard to the intent of the parties as expressed in the collective bargaining agreement.

In short, the problems inherent in the "plausible interpretation" standard, which the Union was unable to address, are fatal problems which place that standard at odds with this Court's teaching. Under that standard, so long as the contract language is in any way ambiguous, arbitrators would be free to dispense their own brand of

industrial justice, make awards based on passion, supposition, unsupported inference, and the arbitrator's personal notions of industrial justice. All such improper decisions would stand, since virtually any interpretation would be "plausible." Thus, it is apparent that notwithstanding any arguments put forth in the Union's Opposition, the "plausible interpretation" standard utilized by the Ninth Circuit stands contrary to applicable decisions of this Court.

Next, the Union attempts to downplay the existence of conflicting standards among the various courts of appeals asserting that this conflict does not exist (Opp p. 7). However, in order to make this argument, it was necessary for the Union to overlook cases cited in the Publisher's Petition, cases which clearly articulate a standard fundamentally different from that utilized by the Ninth Circuit. The Ninth Circuit's "plausible interpretation" or "bottom line" standard neither contemplates nor requires the court's examination of the record before the arbitrator, but merely concentrates on the plausibility of the actual interpretation made. This is directly contrary to the cases cited in the Petition which require recourse to the record so that the reviewing court is able to determine whether or not the arbitrator's decision constituted an interpretation and application of the collective bargaining agreement.

In contrast to the decisions of the First, Fourth, Sixth, Eighth and Tenth Circuit Courts of Appeals cited in the Petition, the standard utilized by the Ninth Circuit would give arbitrators unlimited authority and unbridled power without regard to the parties' intent as expressed in the collective bargaining agreement. Indeed, so long as contract language was in any way ambiguous, the Ninth Circuit's "plausible interpretation" standard would necessarily

result in confirmation, since virtually any interpretation of ambiguous contract language would be plausible.

It is not surprising that the Union did not mention, for instance, the decision of the Sixth Circuit in *Storer Broadcasting Co. v. American Federation of Television and Radio Artists*, 600 F.2d 45 (6th Cir. 1979), *cert. denied*, ... U.S. ....., 70 L.Ed.2d 641 (1981). There, the Sixth Circuit vacated an arbitration award where the arbitrator based his decision on a factual finding that was supported by no evidence in the record. This standard conflicts with the Ninth Circuit's "plausible interpretation" standard as there is no room in the "plausible interpretation" standard for such an analysis. It simply does not permit any review of the record before the arbitrator. Application of the Ninth Circuit's "plausible interpretation" standard to the facts in *Storer Broadcasting* would have necessarily resulted in a totally different decision as the arbitrator's interpretation of the ambiguous contract language was certainly "plausible."

Also not dealt with in the Union's brief is *Detroit Coil Co. v. International Association of Machinists & Aerospace Workers, Lodge No. 82*, 549 F.2d 575 (6th Cir. 1979), *cert. denied*, 444 U.S. 840 (1979). There, the Sixth Circuit vacated an arbitrator's award due to the lack of any evidence in the record that the company and union intended that the contract language in question have the meaning ascribed to it by the arbitrator. This lack of factual support was fatal in the view of the Sixth Circuit, to the validity of that award. The Ninth Circuit's standard, which contemplates review of the arbitration decision's "bottom

line" in an evidentiary vacuum, would not have resulted in vacation of the arbitrator's award based upon the *Detroit Coil* facts.

The Union's failure to distinguish *Electronics Corporation of America v. IUE Local 272*, 492 F.2d 1255 (1st Cir. 1974), is not surprising either as this case too represents a clear break from the "plausible interpretation" standard enunciated by the Ninth Circuit. In *Electronics Corporation of America, supra*, the court carefully analyzed the record before the arbitrator and determined that the factual finding which constituted the basis for the arbitrator's decision was totally lacking in evidentiary support in the record. On the other hand, the minimal standard of review utilized by the Ninth Circuit would have necessarily resulted in a contrary decision, as the issue before the court was whether or not a termination was for just cause. Any result would have been "plausible," even a result that was based not upon the collective bargaining agreement but rather on the arbitrator's own notions of justice and fairness.

Notwithstanding the arguments put forth in the Union's Opposition, it is manifest there is a deep split in the circuits on the standard to be utilized by the courts in reviewing labor arbitration awards. This is a very important standard, critical to the nation's system of labor relations, and to this Court's policy favoring voluntary submission of labor disputes to arbitration. The Union's criticism of the rule of the other circuits, which requires review of the record, cannot detract from the irrefutable fact that a split among the circuits exists. It is respectfully submitted that this Court should exercise its supervisory authority to return national uniformity to this critical area of the law.

Finally, the Union argues even if a rift in the circuits exists, and even if the Ninth Circuit's standard is out of touch with the decisions of this Court, the instant case is not the appropriate vehicle to address these problems since this case allegedly involves an issue of contract interpretation in which the facts were "uncontested" (Opp p. 8). This argument is not persuasive. Indeed, it is surprising that the Union would make such an argument as this case presented hotly contested facts regarding critical issues of bargaining history which cast light upon the parties' intent as to the meaning of the Scanner Agreement's terms. As stated in the Petition (Pet. p. 11), in the instant case the arbitrator ignored his own factual findings that the parties were in complete agreement that the term "strike" in the Scanner Agreement included sympathy strikes. Notwithstanding this finding, the arbitrator interpreted the language otherwise, thus dispensing his own brand of industrial justice.

In short, the arguments presented in the Union's opposition should do nothing to sway this Court from the unmistakable conclusion that there exists a deep split among the circuits as to the appropriate level of review of labor arbitration awards. There is no doubt and it is not contested that this is an important matter, an area in which the courts of appeals need guidance from this Court. The "plausible interpretation" standard is at odds with the decisions of this Court in that it improperly injects courts into the merits of disputes, while at the same time provides no protection against arbitrators who ignore their charge.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petition, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

DATED: December 2, 1982.

Respectfully submitted,

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